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Discriminations Practiced by Russia

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INTERNATIONAL LAW AND THE DISCRIMINATIONS PRACTICED BY RUSSIA UNDER THE TREATY OF 1832.*

By Arthur K. Kuhn.

Article I of the Treaty with Russia, concluded December 18, 1832, provides:

> There shall be between the territories of the high contracting parties, a reciprocal liberty of commerce and navigation. The inhabitants of their respective States shall mutually have liberty to enter the ports, places and rivers of the territories of each party, wherever foreign commerce is permitted. They shall be at liberty to sojourn and reside in all parts whatsoever of said territories, in order to attend to their affairs, and they shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of their submitting to the laws and ordinances there prevailing, and particularly to the regulations in force concerning commerce. (U. S. Treaties in Force, 1904, p. 660.)

The Government of Russia has taken the position that a treaty of commerce and intercourse, such as that of 1832 with the United States, grants no greater rights to citizens of the United States, than is accorded to Russian citizens of the same "class" in Russia. Accordingly, a citizen, whether native born or naturalized, professing the Jewish faith, is denied a right of entry upon the sole ground that Russian subjects of the same faith are likewise denied the privilege of free ingress, egress and residence in Russia.

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*Prepared by request for the Board of Delegates on Civil Rights of the Union of American Hebrew Congregations and the Independent Order B'nai B'rith. Mr. Kuhn is a member of the New York bar, is translator of Meili's "International Civil and Commercial Law," and American editor of Burge's "Colonial and Foreign Law" and Sometime Lecturer on Private International Law at Columbia University, New York.

The most meager reflection leads inevitably to the conclusion that if this contention were permitted to prevail as a guiding principle of international relations, not a single treaty in force with reference to the protection of the rights of citizens of one country within the territory of another could be deemed any longer the source of any definite rights or privileges. However definite might be the right or privilege granted by treaty to the citizens of a foreign state, it could be rendered nugatory simply by denying the right or privilege to native citizens.

The acceptance of any such principle would revolutionize the relations of states upon the basis of conventions, and would extend the class distinctions made in one nation, beyond the borders of that nation, to the territory of every other nation with which it had treaty relations affecting aliens.

Russia first asserted the theory in 1862 in its diplomatic correspondence with Lord Russell representing the British Foreign Department. No report of this correspondence is to be found in the published record of British State Papers, but it is referred to, however, in the correspondence which passed in 1880 with reference to the case of Lewisohn, a British subject of Jewish faith, who was expelled simply by reason of the creed which he professed. Lord Granville at first took a vigorous stand against any discrimination, writing to the British Ambassador that: "The treaty between this country (Great Britain) and Russia of the 12th January, 1859, applies to all Her Majesty's subjects alike, without distinction of creed." (British State Papers, Vol. 73, p. 833.)

For some reason which does not clearly appear, Lord Granville afterwards surrendered his position in the matter and followed the precedent of 1862 and insisted only that British subjects should be placed on the same footing as Russian subjects of the same "class." He did not admit the correctness of the principle as a guide for the interpreta-

tion of the treaty; he simply did not desire to overrule his predecessor. Indeed, he clearly enunciated the choice of principle which was involved, for he says: "The treaty is no doubt open to two possible constructions: the one, that it only assures to British subjects of any particular creed the same privileges as are enjoyed by Russian subjects of the same creed; the other, that the privileges are accorded to all alike without regard to the religious body to which they belong." (British State Papers, Vol. 73, p. 845.) It has since become apparent that diplomatic considerations induced Great Britain to refrain from insisting on the construction of the treaty which she herself deemed correct.

In striking contrast to the weak position finally taken by the British Government upon this question, prompted probably by considerations of policy and expediency, rather than of international legal justice, was the attitude taken at the same time by the United States with reference to the same contention. The reporter of the British State Papers has included in the report of the correspondence in the Lewisohn case, an abstract of the correspondence passing between our Secretary of State, William M. Evarts, and Minister John W. Foster, in 1880, with reference to the attempted expulsion of Henry Pinkos, an American citizen of Jewish faith. In Mr. Evarts' letter of June 28, 1880, he said:

> "In reply I have to observe that in the presence of this fact, that an American citizen has been ordered to leave Russia on no other ground than that he is the professor of a particular creed, or the holder of certain religious views, it becomes the duty of the Government of the United States, which impartially seeks to protect all its citizens of whatever origin or faith, solemnly, but with all respect to the Government of His Majesty, to protest. As this order of expulsion applies to all foreign Jews, in certain towns or localities, at least, of Russia, it is of course apparent that the same is not directed especially against the government of which Mr. Pinkos is a citizen, and, indeed, the long-

standing amity which has united the interests of Russia with those of this government would of itself forbid a remote supposition that such might be the case. Notwithstanding this aspect of the matter, the United States could not fail to look upon the expulsion of one of its citizens from Russia, on the simple ground of his religious ideas or convictions, except as a grievance, akin to that which Russia would doubtless find in the expulsion of one of her own citizens from the United States on the ground of his attachment to the faith of his fathers." (Foreign Relations of the United States, 1880, p. 876.)

While the correspondence with reference to the attempted expulsion of Pinkos was proceeding, Pinkos left Russia with his family, because "he had made up his mind that Russia was no place for one of his creed, and that he proposed to establish himself in Liverpool, or return to the United States." Notwithstanding this fact, Mr. Evarts had determined not to let the matter rest. No true American can read his final letter of instructions, dated September 4, 1880, without strong sentiments of pride and satisfaction at the brave, as well as just, position assumed by our Secretary. The letter so clearly sets forth the true interests and traditional policy of the United States with reference to the protection of its citizens in foreign countries, that it will be well to the purpose to quote his letter in full (Foreign Relations of the United States, 1880, p. 880):

"Department of State,
Washington, September 4, 1880.

Sir: I have to acknowledge receipt of Mr. Hoffman's No. 23 of the 11th ultimo in the Pinkos case.

Notwithstanding the tenor of your No. 9 and of your note to the Department of July 24th last, as to the inexpediency of presently appealing to the Government of the Czar in the sense of the instruction of June 28th last, touching the expulsion of citizens of the United States from Russia (or certain cities there-

of) by reason of their religious convictions, the statements of Mr. Hoffman's No. 23, of August 11th last, are such that the Government of the United States would seem indifferent to the cause of its citizens in Russia did it neglect to make immediate remonstrance as set forth in said instruction of June 28th. Mr. Hoffman's inference from the facts connected with Mr. Pinkos' departure from Russia is that Mr. Pinkos had made up his mind that Russia 'was no place for one of his creed.'

If the meaning of this is that a citizen of the United States has been broken up in his business at St. Petersburg, simply for the reason that he is a Jew rather than a believer in any other creed, then it is certainly time for this government to express itself as set forth in the instruction above mentioned. It should be made clear to the Government of Russia that in the view of this government the religion professed by one of its citizens has no relation whatever to that citizen's right to the protection of the United States, and that in the eye of this government an injury officially dealt to Mr. Pinkos in St. Petersburg on the sole ground that he is a Jew, presents the same aspect that an injury officially done to a citizen of Russia in New York for the reason that he attends any particular church there would to the view of His Majesty's Government.

It is evident that the losses incurred by the abandonment of his business in St. Petersburg will afford Mr. Pinkos ground for reclamation, if no other cause can be shown for the official breaking up of his said business than the religious views he entertained.

The direct application to have Mr. Pinkos indemnified, however, may be deferred until he shall make it appear what those losses were.

I am sir, etc.,

WM. M. EVARTS."

The policy thus established was ably supported and reasserted by Mr. Blaine. In a letter, dated July 29, 1881, to Mr. Foster, he reviewed the treatment of alien Jews in Russia since the reign of the Empress Catherine, and

disposed of the contention made by Russia in the following terms (Foreign Relations of the United States, 1881, p. 1033):

> "These questions of the conflict of local law and international treaty stipulations are among the most common which have engaged the attention of publicists, and it is their concurrent judgment that where a treaty creates a privilege for aliens in express terms, it cannot be limited by the operation of domestic law without a serious breach of the good faith which governs the intercourse of nations. So long as such a conventional engagement in favor of the citizens of another state exists, the law governing natives in like cases is manifestly inapplicable."

The State Department has consistently refused to accept the principle now contended for by Russia, not only in our diplomatic relations with that country, but also with other countries as well.

Prior to the Constitution of Switzerland of 1874, under which religious equality is now guaranteed as effectually as in the United States, subjects of Jewish faith were prohibited from establishing themselves in certain Cantons and were under heavy disabilities in others. Representations were made to Switzerland by several European countries, as well as by the United States, in reply to which these Cantons maintained the right to impose the same disabilities on subjects of foreign nations with which Switzerland had concluded treaties of friendship, commerce and intercourse, as were imposed on natives of the same class in Switzerland. In opposition to this contention, Mr. Seward, our Secretary of State, entered into a voluminous correspondence with Mr. Fay, the American representative in Switzerland, instructing him to insist upon the rights of American Jews, notwithstanding the disabilities under which the particular Cantons had placed Jews of Swiss origin.

It must be recalled that the treaty under which the Swiss Cantons had maintained their contention was couched in language much more favorable to their position than anything contained in the Treaty of 1832 with Russia. The Treaty with Switzerland of 1855 had been, at the time of its adoption by the Senate, the subject of opposition by President Fillmore. In his message transmitting the Treaty to the Senate, he objected seriously to the form in which it was presented and said:

> "On account of the tenor of the Federal Constitution of Switzerland, Christians alone are entitled to the enjoyment of the privileges guaranteed by the present Article in the Swiss Cantons. But said Cantons are not prohibited from extending the same privileges to citizens of the United States of other religious persuasions.
>
> It is quite certain that neither by law, nor by treaty, nor by any other official proceeding is it competent for the Government of the United States to establish any distinction between its citizens founded on differences in religious beliefs. Any benefit or privilege conferred by law or treaty on one must be common to all, and we are not at liberty, on a question of such vital interest and plain constitutional duty, to consider whether the particular case is one in which substantial inconvenience or injustice might ensue. It is enough that an inequality would be sanctioned hostile to the institutions of the United States and inconsistent with the Constitution and the laws.
>
> Nor can the Government of the United States rely on the individual Cantons of Switzerland for extending the same privileges to other citizens of the United States as this article extends to Christians. It is indispensable not only that every privilege granted to any of the citizens of the United States should be granted to all, but also that the grant of such privilege should stand upon the same stipulation and assurance by the whole Swiss Confederation as those of other articles of the convention." (Richardson's Messages and Papers of the Presidents, Vol. V, p. 98.)

In the form in which Article I of the Treaty was finally ratified, the objection of President Fillmore was only partially met. It reads as follows:

> "The citizens of the United States of America and the citizens of Switzerland, shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment shall not conflict with the constitutional or legal provisions, as well Federal as State and Cantonal of the contracting parties." Then follow the provisions relating to free establishment, exercise of commerce, etc. (United States Treaties in Force, 1904, p. 769.)

Mr. Fay, under instructions from the Secretary of State, left no stone unturned to obtain for American citizens of the Jewish faith the same rights and privileges as were accorded to American citizens generally, and personally prepared a petition addressed to the various Cantons of Switzerland in behalf of his contention. This petition was translated into French and German and widely circulated throughout Switzerland. It was reported as an Executive Document. (No. 76, Thirty-sixth Congress, First Session, Vol. 12, p. 67.) It is not necessary to refer to it at length inasmuch as Mr. Fay was prevented from relying upon the strictly legal rights of the United States because of the peculiar limitations which it contained. The entire incident is made the subject of a special paper read before the American Jewish Historical Society by Mr. S. M. Strook in 1903 ("Switzerland and the American Jews," Publications of the American Jewish Historical Society, 1903, p. 7).

It is sufficient to say that Mr. Seward continued throughout to demand the removal of discriminations made on account of religious faith, notwithstanding the unfavorable language of the Treaty of 1855. He continued his instructions along this line to Mr. Fay's successor, Mr. Fogg, who co-operated with the French Government. France, at that time, was particularly energetic in demanding full treaty

rights to its citizens of Jewish faith. In 1851, Louis Napoleon, through the French Minister at Berne, sent a note in which he stated that France would expel all Swiss citizens established in France in case the two Cantons (Basle City and County) would insist on carrying out their law prohibiting the establishment of French citizens of the Jewish faith on their territory. (Allgemeine Zeitung des Judenthums, December 15, 1851; January 1, 1852; S. M. Strook, op. cit., pp. 12-13). The matter was finally referred to a commission of the Senate of the Second Empire and in 1864 a report was made through the chairman of the commission, Ferdinand de Lesseps, in the following terms:

> "No distinction may be recognized in the enjoyment of civil and political rights between a French Jew and a French Catholic or Protestant. This equality of rights must also follow a citizen beyond the frontier; and the principles of our Constitution do not authorize the Government to protect its subjects in a different manner according to which faith he professes." (See Débats Parlementaires, 1909, p. 3779.)

As a result of this movement, the French Government finally repudiated the prior treaties which were unsatisfactory in failing to guarantee equal treatment to all French citizens, and a new treaty was obtained from Switzerland in which such a guarantee was expressly made by recognizing "the right of French subjects, without distinction of faith or worship, to travel, sojourn, and transact all lawful business, as freely as Swiss Christian residents of other Cantons may do." (Foreign Relations of the United States, 1864, p. 401.)

The victory which French diplomacy had won over the illiberalism of the Swiss Cantons solved the problem of the United States Government as well. In reporting upon the result of the ratification of the French Treaty, the United States Minister, Mr. Fogg, wrote to Mr. Seward, as follows:

"The treaty just ratified secures, it is true, only the rights of French Jews, but it will be followed by treaties with other powers, and must, in the end, enfranchise the whole race, since the Swiss authorities having taken the first step in a movement so obviously just, and so imperatively demanded by the spirit of the age and their own position as the vanguard of liberty in Europe, they cannot recede, but must go forward." (Foreign Relations of the United States, 1864, p. 402.)

The correspondence of the Department of State with other countries besides Russia, discloses a consistent policy against permitting local discriminations in foreign countries to operate unfavorably upon our citizens because of religious belief. Thus, in 1897, an application was addressed by the United States Consul at Jerusalem to the Turkish officials in charge of the Land Department there, for permission on behalf of one Lowenstein, a United States citizen, to purchase a small property consisting of a house and some land. The application was denied on the ground that Lowenstein was a Jew, and, under Ottoman law, prohibited from holding land. Under the sanction of Mr. Sherman, United States Secretary of State, a remonstrance was addressed to the Sublime Porte and a nullification of the order was demanded:

"If an American citizen be denied the right to acquire real estate in this empire on the ground that he is alleged to be of a certain religious faith, the duty of the minister to his government would require him to protest against such discrimination as inadmissible. Equal rights under treaties are claimed for all American citizens, regardless of the faith they profess." (Mr. Angell, United States Minister, to Turkish Minister of Foreign Affairs, Foreign Relations of the United States, 1898, p. 1104.)

The action of Mr. Angell was approved by the Department of State, and Mr. Sherman afterwards expressed his gratification at the result of the remonstrance. (*Ibid.*)

The United States has heretofore insisted upon the treaty rights of its citizens, irrespective of discriminations in foreign countries made not only on account of religion, but also on account of race or color. Thus, in June, 1882, Mr. Frelinghuysen, our Secretary of State, in writing to Mr. Hamlin, Minister to Spain, called attention to the fact that the Spanish Consul-General at New York had refused to visé the American passport of a colored citizen of the United States on the ground of his color. It seems that the refusal to visé was arbitrary, and the visé was ordered to be granted by the Spanish Government. The Secretary of State nevertheless took occasion to remark that there would be no good reason why a negro resorting to Cuba bearing a passport as an American citizen should be refused admission or be met by legal prohibitive measures such as depositing large sums as a guaranty. He afterward stated that if a case should be brought to his notice the Department would remonstrate against it "as imposing a race discrimination not affected by treaty or recognizable under the amended Constitution." (Moore, International Law Digest, Vol. 4, p. 109, quoting from MSS. Inst. Spain XIX, p. 139.)

The normal relation of states, especially under conditions of modern life, even in the absence of treaty, is one of free intercourse. This was recognized by Vattel as early as the seventeenth century, when he contrasts the condition of China and Japan with that of Europe, where "the access is everywhere free to every person who is not an enemy of the state." (Droit des Gens, l, ii, c. viii, s. 100.)

We would not wish to be understood as denying the theory of international law that in the absence of treaty, each state has the right to exclude aliens from its soil. This right is commonly spoken of as one of the essential at-

tributes of sovereignty. However, when rights of entry or residence have been extended by treaty to the subjects of a foreign nation, all the subjects of that nation are entitled to the benefit of the treaty, even though incidentally they receive greater privileges under it than native subjects.

There is not lacking substantial European authority for the principle that religious liberty may be predicated in favor of aliens on the basis of treaties. G. F. von Martens, the great German publicist and diplomatist, who made the law of treaties his special study, says (translating from his Precis du droit des gens, 2d Ed. 1864, Vol. 1, p. 121):

> "The degree of liberty accorded to other religions than those of the particular state differs according to the fundamental laws and *treaties in effect with foreign powers* and, in default of them, it depends upon the will of each state guided by principles of a wise tolerance. This is true also with regard to the tolerance accorded religious sects which have no connection with the religion of the country, such as the Socinians, the Anabaptists, the Moravian Brethren, etc., and rarely any question arises in the foreign relations of European countries as to their rights, as well as those of the Jews."

Even Russian authority is in substantial accord. Professor F. de Martens, late president of The Hague Peace Congress, and probably the most distinguished Russian authority of our generation on international law, seems to have been in substantial accord, although he may have been unwilling to effectuate the principle by application in practice. In his Traité de droit international (translated from the Russian into French by A. Leo, 1883, Vol. 1, p. 447) he asserts that the state has complete power over aliens in its territory, and the conditions on which it will admit them. It may not place them, however, beyond the protection of law, nor subject them to general expulsion. Any nation guilty of this would take itself outside of the

community of nations. With this exception, even though the provisions be vexatious or completely different from those prevailing in any other state or countries, or inconsistent with a sane or wise political administration, "aliens must nevertheless conform to them, *unless the provisions respecting them are in opposition to international treaties.*" In a footnote he points to the action of Lord Granville in refusing to insist upon greater rights for a British subject than accorded to Russian Jews in Russia, to which we have already referred at length. He naturally is well satisfied with the British submission to the Russian contention, though it is difficult to see how the footnote in any way illustrates the text. He seems to have considered it a clear departure and exception to the principle which he himself enunciates. In concluding this branch of his discussion he says (translating): "In reality each government is free to take all measures against aliens which it deems convenient, *provided they do not violate its treaties* and are not absolutely contrary to international relations."

As a matter of strict legal right then, each nation may, in the absence of treaty, exclude aliens from its territory or prescribe the conditions upon which it will admit them. But as a matter of comity, friendly intercourse and good faith between nations of the international community, the situation is different. Hall well says (International Law, 5th Ed., p. 214): "For the reason also that a state may do what it chooses within its own territory so long as its conduct is not actively injurious to other states, it must be granted that in strict law a country can refuse the hospitality of its soil to any, or all, foreigners; but the exercise of the right is necessarily tempered by the facts of modern civilization. For a state to exclude all foreigners would be to withdraw from the brotherhood of civilized peoples; to exclude any without reasonable or at least plausible cause is regarded as so vexatious and oppressive that a government is thought to have the right of interfering in

favor of its subjects in cases where sufficient cause does not, in its judgment, exist."

Hannis Taylor has said that while no state can be compelled to open its doors to the citizens of another state, its power of refusing hospitality is subject: "To such retaliatory measures as an abuse of the excluding or expelling power may provoke." (International Public Law, p. 231.)

If such be the trend of modern international law even in the absence of treaty, then surely the Russian treaty should be liberally and not strictly construed. Russia pursues a policy and practice of general exclusion against particular classes of United States citizens solely on account of their religious beliefs, no matter how high their character and reputation may be and irrespective of whether they are by any reasonable construction detrimental to the interests of Russia. In the light of the tendencies of modern international relations, this constitutes a clear indication that the Treaty of 1832 is not being construed by Russia according to that standard of *ubberima fides* which one friendly nation owes to another in the performance of its conventions.

It is sometimes suggested that the policy of the United States in excluding the Chinese constitutes an argument in opposition to the position which we are here urging. Without wishing at this time to discuss the justice or expediency of the Chinese Exclusion Acts in their present state, it is sufficient for the purpose of the present discussion to recall that the Exclusion Acts required a modification of our treaty relations with the Chinese Empire on more than one occasion. Twice did Congress attempt to pass bills which under a fair interpretation might have been deemed inconsistent with the obligations under the treaty and twice were such bills vetoed by the President. President Hayes vetoed the bill of 1879 as in contravention of the provisions of the Burlingame Treaty, and President Arthur likewise

vetoed the bill of 1882 which he termed "a breach of our international faith," because in violation of the Treaty of 1880. (Richardson, Messages and Papers of the Presidents, Vol. VII, p. 514, Vol. VIII, p. 112.)

Since that time successive Acts have been accompanied by such new diplomatic arrangements with China as were necessary in order to protect the faith of the United States, notably among which was the Treaty of December 8, 1894, by which China consented to the absolute exclusion of Chinese laborers.

The denunciation of a treaty is justified where one of the parties has been guilty of a substantial breach, or has so interpreted it that the rights and privileges granted under it are enjoyed by one side, while the complete performance of its obligations is rendered only by the other. (Hall, International Law, p. 352.) Even if we concede the legal contention made by Russia the treaty should nevertheless be denounced by the one year's notice provided for in the treaty itself (Art. XII). At the time it was passed, Russia's attitude toward native as well as alien Jews was favorable and very different from that of the past half century. The treaty was not drawn in contemplation of any of the discriminations which are now practiced under it. If the treaty does warrant the interpretations now placed upon its language by Russia (which we earnestly deny) it commits the United States to a doctrine which is expressly prohibited under its Constitution, its statutes, its fundamental institutions and its historic diplomatic policy.

Furthermore, if distinctions of race or creed are permitted to enter into the status of our citizenship in foreign countries in respect of rights and privileges, it is inevitable that distinctions will likewise arise on the side of duties and obligations. The relationship of allegiance between the citizen and state is a mutual one. Thus, for example, a treaty of amity and friendship between two nations is binding upon all citizens and no distinctions among them ought

to be or is permissible. Any citizen who violates his duty of neutrality subjects himself not only to the loss of his right to protection, but also to affirmative penalties. The Supreme Court has said, in Kennett v. Chambers, 14 How., 38:

> "For, as sovereignty resides in the people, every citizen is a portion of it * * * and when that authority has plighted its faith to another nation, that there shall be peace and friendship between the citizens of the two countries, every citizen of the United States is equally and personally pledged."

If every citizen is to be "equally and personally" pledged to abide by a treaty of amity and friendship, every citizen should likewise be "equally and personally" benefited without discrimination under treaties relating to the citizens of his country.

The treaty thus involves fundamental danger to the equality involved in republican institutions. It is for that reason that France is likewise awake to the distinction which Russia has endeavored to import into French citizenship upon the basis of the Treaty of 1874 between France and Russia, notwithstanding the plain terms of the convention of 1905 which provides that "no distinction shall be made, whatever be the religion." On December 27, 1909, a full discussion of these discriminations practiced by Russia took place in the French Chamber of Deputies. Mention was made of the incident between France and Switzerland during the Second Empire to which we have already referred, as well as to a precedent which occurred shortly after the Congress of Vienna of 1815. Austria undertook to treat Ottoman Jews differently from other Ottoman subjects because she treated her own Jews differently from her other subjects. The Sublime Porte protested that she could not permit of the slightest difference being made between any Turkish subjects, no matter what their creed, and in September, 1815, M. de Metternich gave

Turkey satisfaction, and thenceforward all Turkish subjects were treated alike.

At the conclusion of the debate, the Chamber of Deputies called upon the administration to undertake negotiations with Russia for an interpretation which would definitely set aside the objectionable discriminations. (Débats parlementaires, 1909, pp. 3763-3780; Am. Jewish Year Book for 1911, pp. 66-76.)

It is dangerous to temporize in respect of legal principle with class, race, or religious discriminations. The United States, after a long and bitter struggle, has happily extirpated from the body of its organic law all such discriminations affecting its citizens. Such discriminations should not be permitted to enter by the back door, as it were, through weakness or vacillation in the enforcement of the rights of citizens in international relations.